



POLICE DEPARTMENT CITY OF NEW YORK

June 13, 2017

MEMORANDUM FOR: Police Commissioner

Re: Police Officer Ernesto Bautista
Tax Registry No. 953671
40th Precinct
Disciplinary Case No. 2016-15157

Charges and Specifications:

1. Police Officer Ernesto Bautista, on or about July 18, 2015, at approximately 0600 hours, while assigned to the 40th Precinct and on duty, in the vicinity of 40th Precinct stationhouse, Bronx County, wrongfully used force, in that he used a chokehold against Person A.

P.G. 203-11 - USE OF FORCE

2. Police Officer Ernesto Bautista, on or about July 18, 2015, at approximately 0600 hours, while assigned to the 40th Precinct and on duty, in the vicinity of 40th Precinct stationhouse, Bronx County, wrongfully used force, in that he restricted Person A's breathing without police necessity.

P.G. 212-49, Page 2 - ADDITIONAL DATA

Appearances:

For CCRB-APU: Raasheja Page, Esq. and Timothy Jones, Esq.
Civilian Complaint Review Board
100 Church Street, 10th floor
New York, NY 10007

For the Respondent: Craig Hayes, Esq.
Worth, Longworth & London, LLP
111 John Street – Suite 640
New York, NY 10038

Hearing Date:

March 29, 2017

Decision:

Not Guilty

Trial Commissioner:

ADCT Paul M. Gamble

REPORT AND RECOMMENDATION

The above-named member of the Department appeared before me on March 29, 2017. Respondent, through his counsel, entered pleas of Not Guilty to the subject charges. CCRB called no witnesses but offered the hearsay statements of Person A, Person B, and Person C. Respondent testified on his own behalf. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

After reviewing the evidence presented at the hearing, and assessing the credibility of the witnesses, I find Respondent Not Guilty of the charged misconduct.

FINDINGS AND ANALYSIS

The following is a summary of the facts which are not in dispute. On July 18, 2015, Respondent was assigned to the Conditions Unit at the 40th Precinct (T. 26; CCRB Ex. 4, p. 3). At approximately 0043 hours, Person A (hereinafter "Person A") was arrested in the 40th Precinct (T. 21). Police Officer Ruben Guerrero initially stopped, searched and placed Person A under arrest for Driving While Intoxicated. When Respondent arrived on the scene, he was assigned as the arresting officer and transported Person A to the 40th Precinct stationhouse (T. 21-22, 46).

Upon returning to the stationhouse, Respondent placed in a holding cell with several other male detainees¹ (T. 47; CCRB Ex. 6, pp. 1-2). At or around 0600 hours, Respondent entered the holding area and removed Person A from his cell so that he could use a telephone (T. 49; CCRB Ex. 1-A at 3-4; CCRB Ex. 10 at 4. 15-16). At this time, the Respondent

¹ Person B and Person C were among the other detainees being held in the same cell as Person A (CCRB Ex. 6)

was the only officer in the holding area; Respondent was unarmed, and Person A was not handcuffed (T. 52; CCRB Ex. 1A at 28). Respondent and Person A then walked over to a telephone affixed to the wall across from the holding cell (T. 49; CCRB Ex. 1A at 28). A verbal confrontation, which escalated into a physical struggle, ensued between Person A and the Respondent over the telephone handset, the circumstances of which are in dispute (T. 51-52, 55-57; CCRB Ex. 1A at 5-9; CCRB Ex. 3A at 8). In the course of the physical struggle, Respondent sustained an abrasion on his right hand (T. 58; CCRB Ex. 10 at 17-18; *see also* CCRB Ex. 5). Alerted by the sounds of a disturbance in the holding area, Guerrero entered with other police officers and assisted Respondent in removing the handset from Person A's hand (T. 24-25, 57; CCRB Ex. 1A at 46-47). Guerrero then told Respondent to leave the room, which he did (T. 27). Guerrero eventually returned Person A to the holding cell (T. 27, 60).

Later that morning, Person A was transported to Bronx Central Booking (T. 27, 60). While at Bronx Central Booking, Person A submitted to a pre-arraignment medical screening (CCRB Ex. 10 at 25; CCRB Ex. 8, pp. 2-3). According to the screening form, dated July 18, 2015, and time-stamped 0930 hours, Person A did not appear to be sick or injured (CCRB Ex. 8, pp. 2-3). Person A was then taken to [REDACTED] (hereinafter "[REDACTED]") by a police escort. Person A was admitted to the emergency room at [REDACTED] on July 18, 2015, at approximately 1050 hours. (CCRB Ex. 8, pp. 8-31). At the time of admission, Person A complained of neck and back pain (*Id.*). Person A further reported that he had been "beaten by police" (*Id.*).

While at [REDACTED], Person A was treated by [REDACTED] (*Id.*). According to Dr. [REDACTED] progress notes, he did not observe any visible evidence of trauma to Person A's neck or back (*Id.*). Dr. [REDACTED] also reported that [REDACTED] exhibited "normal respiratory effort

and good air exchange” (*Id.*). Dr. [REDACTED] diagnosed Person A as having a muscle spasm near his right lower back (*Id.*). Person A received medical treatment and was discharged from the emergency room the same day at approximately 1550 hours (*Id.*).

At issue is whether Respondent: (1) improperly used a chokehold against Person A; and (2) restricted or hindered Person A’s breathing without police necessity. The following is a summary of the facts which are in dispute. During his scheduled tour, Respondent was directed to take over the arrest of Person A (T. 46). When Respondent first arrived on the scene of Person A’s arrest, he was handcuffed and seated in the back of Guerrero’s RMP (*Id.*). Respondent assumed custody of Person A and transported him from the arrest location to the 40th Precinct station house. Respondent testified that the trip was uneventful (T. 46-47).

Once at the stationhouse, Respondent lodged Person A in a holding cell (T. 47). At approximately 0600 hours, Respondent took Person A out of the holding cell and walked him over to a telephone mounted on the wall of the holding cell area (*Id.*). As they walked toward the telephone, Respondent asked Person A for the telephone number of the person he wanted to call (T. 49). Respondent picked up the telephone headset, dialed the telephone number that Person A provided and waited for an answer before handing the handset to Person A (T. 49-50).

Respondent testified that Person A engaged in conversation about his arrest for approximately one minute, with a person he believed to be female before the tone of the conversation changed (T. 51). Person A became upset and began cursing in a loud voice and directed profanities at Respondent (*Id.*; T. 68-69). Person A told the other party to the conversation: “I don’t know why the f-ck I’m here”; “I don’t know why I’m f-cking arrested”; “The f-cking pigs brought me here for nothing” (T. 52; *see also* CCRB Ex. 3A at 8). Respondent warned Person A that he could either refrain from using offensive language or end the call (T.

52). When Person A persisted in the volume and tenor of the conversation, Respondent told him to "hang up the phone" (T. 53). Person A replied, "No" (*Id.*). Respondent directed Person A to hang up the telephone at least three times with Person A giving the same response (*Id.*).

Respondent testified that he thought he heard a dial tone, despite Person A continuing his invective; Respondent disconnected the call by depressing the switchhook with his finger and directed Person A to give him the handset (T. 54-55, 70). Person A refused to give the handset to Respondent, so he attempted to remove it from Person A's right hand (T. 55). Person A flailed his arms around in the air before pulling his right hand back, still holding the handset (*Id.*).

Respondent was standing to Person A's left side, as Person A held the handset away from his body in his right hand (*Id.*). Respondent described the positioning of Person A's body as "blading more to the right side so I couldn't get to the phone" (T. 56). Person A eventually let his right hand fall to his side but maintained a tight grip on the handset; Respondent saw Person A's muscles flex and his veins bulge (*Id.*). Respondent testified that he was concerned that Person A would strike him with the handset (T. 51, 56, 73). Respondent again attempted to retrieve the handset from Person A's grip, and a struggle ensued; Person A flailed his arms and refused Respondent's verbal commands to hand him the phone while Respondent gripped Person A's right wrist, first with his left hand and eventually with both hands (T. 56-58). Approximately ten seconds later, Guerrero entered the room and grabbed Person A's left arm while Respondent eventually removed the handset from Person A's right hand (T. 57-59). Respondent and Guerrero placed Person A up against the wall, face first, near the entrance to the holding cell before walking him back into the cell (T. 60). Guerrero then told Respondent to leave the holding room area, which he did (T. 61).

Respondent denied placing his elbows, arms or any other part of his body against Person A's neck and further denied placing Person A in a choke hold or headlock at any time during the struggle referenced above (T. 61- 62). On cross-examination, Respondent acknowledged that in his CCRB interview, he failed to mention his assertion that he heard a dial tone before he disconnected Person A's call (T. 70). Respondent further conceded that he could not recall whether he described Person A holding the handset while standing in a bladed position during his CCRB interview (T. 77-78).

Guerrero testified that his attention was drawn to the holding cell area when he overheard Respondent and another voice engaging in a loud verbal exchange which sounded like an argument (T. 23). At the time, Guerrero was inside of the muster room of the 40th Precinct stationhouse (*Id.*). Guerrero entered the holding area to investigate and observed Person A holding a telephone handset² in his hand, tightly gripped, raised midway up his body and slightly cocked back while standing in a "bladed" position (T. 24). Guerrero quickly grabbed Person A's left arm while Respondent grabbed Person A's right arm (T. 25). According to Guerrero, Person A kept pulling the handset away from the officers (T. 26). Guerrero instructed Person A to let go of the handset several times before he finally acquiesced (*Id.*). Once Person A let go of the handset, Guerrero and Respondent placed him face forward against the wall inside the holding cell (*Id.*). Respondent then left the holding room at Guerrero's request (*Id.*).

Guerrero testified that Person A then told him that he wanted to use the telephone; Guerrero told Person A to calm down and wait for another opportunity to use it (T. 27). After a short conversation with Person A, Guerrero left the holding area (*Id.*). Guerrero testified that Person A did not complain about Respondent's alleged excessive use of force during their brief

² Guerrero uses the term "telephone receiver" in his testimony but "handset" has been substituted for consistency.

conversation, nor did he observe any visible injuries to Person A's person (T. 28-29). Guerrero testified further that he did not observe Respondent strike, choke or otherwise place Person A in a headlock hold during the physical struggle he witnessed and participated in (*Id.*).

Person A made two statements to CCRB: a telephonic statement, made on July 28, 2015, and an in-person statement, made on August 10, 2015. Both statements were entered into evidence (CCRB Ex. 10, 1A).

In Person A's July 28, 2015, statement, he asserted that once he was placed in the holding cell at about midnight, he asked Respondent for a telephone call (CCRB Ex. 10 at 4). Person A claimed that Respondent assured him that he would be able to make one (*Id.*). Person A did not see Respondent again until approximately 0700 hours the following morning when he renewed his request (*Id.*.. 15). Person A stated that he detected " an attitude" like Respondent "didn't want to give it to me" (*Id.*). Person A then told Respondent that if he would not permit him to make a call, he wanted to make his request to someone in authority (CCRB Ex. 10 at 4-5, 16). At that point, Respondent told Person A he could make his call (*Id.*). As Person A was trying to make the call, he asked Respondent what his charges were (*Id.* at 5). Respondent informed him of the charges and Person A began disputing them, which led to Respondent terminating the call (*Id.*). When Person A asked again to speak to a supervisor, Respondent began choking him by throwing him on a table and placing him in a headlock (*Id.*). Police officers eventually came into the holding cell area and broke up the altercation (CCRB Ex. 10 at 6).

According to Person A, Respondent began choking him from the front by "slamming" him into a gate and choking him with his right hand (*Id.*.. 17). Person A told Respondent that he couldn't breathe, but Respondent initially refused to release his grip; when Respondent eventually did release his grip, he flipped Person A onto his stomach onto a table and resumed

choking him from behind by using a “choke hold” (*Id.* at 6-7, 19). Person A also claimed that other detainees witnessed the altercation and shouted, “He’s choking him,” to which Respondent replied, “No, I’m giving him a hug” (*Id.* at 27). Respondent allegedly repeated this disavowal to the officers who entered the holding cell area while he was still choking Person A from behind (*Id.*).

In Person A’s August 10, 2015, statement, he alleged that after Respondent had disconnected his phone call, he made a request to speak with Respondent’s supervisor, to which Respondent replied, “You’re not going to speak with anyone” (CCRB Ex. 1A at 4). Person A stated that he then told Respondent that he would not move until he spoke to someone in charge (*Id.*). In response, Respondent allegedly extended his right arm and grabbed Person A by the front of his neck (*Id.* at 5-6). Respondent then used his left hand to push Person A’s back into a gated window and began squeezing Person A’s neck with his right hand (*Id.*). Person A said, “I can’t breathe. Get off of me,” but Respondent refused to release his hold on Person A’s neck (*Id.* at 6). Person A stated that he attempted to grab Respondent’s right hand, but Respondent slammed him face-first onto a nearby table top (*Id.* at 6, 35-36). Person A attempted to get up from the table, but the Respondent placed him in a “headlock hold”³ (*Id.* at 7, 37). Person A asserted that he was unable to breathe while he was in the headlock (*Id.* at 8). Person A asserted for the first time in the August 10th statement that Respondent also placed his hands over Person A’s mouth (*Id.* at 9).

According to Person A, Respondent was choking him from behind while he pushed his body forward in an attempt to break free from Respondent’s hold (*Id.* at 9-10, 39). A few seconds later, at least ten police officers entered the holding cell area and separated Respondent

³ Throughout his August 10, 2015, statement to CCRB, Person A uses the words “headlock hold” and “choke hold” interchangeably (see CCRB Ex. 1A at 37-39)

and Person A (*Id.* at 44-45). After the officers had separated them, Person A engaged in a brief conversation with Guerrero which was interrupted when Respondent lunged at him from across the room, grabbed his arm and pushed him to face the cell gate (*Id.* at 10, 48-49, 51-53). Person A claimed that he sustained a small, painful bruise on his back as a result of being slammed into the window gate by Respondent⁴ (*Id.* at 12-13).

Finally, Person A claimed that in addition to the above-referenced assault, Respondent unlawfully strip searched him in public at the time of his arrest (*Id.* at 65-70; *c.f.*, CCRB Ex. 10).

Few things are more difficult, yet more fundamental to the role of a trier of fact, than attempting to reconstruct past events on the basis of opposing accounts. In a hearsay case of this nature, particular attention must be paid to the evidence. This tribunal has held many times that while hearsay is admissible in administrative proceedings, and may be the sole basis for a finding of fact, it must be carefully evaluated before it is relied upon. The more important the evidence is to the case, the more critically it should be assessed (*Police Department v. Acosta*, OATH Index No. 464/00 [Jan. 7, 2000]). Factors such as corroboration, consistency, bias, logic and the degree to which an account comports with common sense and general human experience must be taken into account (*Maloney v. Suardy*, 202 A.D.2d 297, 609 N.Y.S.2d 179 [1st Dep't 1994]).

I do not credit Person A's statements, as they are unreliable, exaggerated and biased. First, I find the unexplained timing of his telephonic complaint to CCRB, ten days after the alleged incident, to be indicative of a motive to fabricate. There is also evidence of exaggeration and embellishment. For example, his belated claim of being strip-searched on the street at the time of his arrest is dubious. The strip search, as described by Person A, actually amounts to a

⁴ During his July 28th telephonic statement to CCRB, Person A claimed that he sustained "multiple neck bumps," which he speculated were from the Respondent's handprint, in addition to the bruise on his back (CCRB Ex. 10 at 8-9). Person A did not include this assertion in his August 10th statement to CCRB.

body-cavity search. Had such an event actually occurred, it is doubtful that he would have failed to bring it to the attention of CCRB in his first contact. It is even more unlikely that he would have waited 23 days from the date of the incident to make the allegation, if truthful.

Second, Person A did not appear before the tribunal and subject himself to cross-examination. While hearsay statements are admissible in this forum, prudence dictates that the finder of fact be cautious in accepting the factual assertions contained therein without a degree of skepticism. Person A's assertion that while Respondent was choking him from behind in a chokehold, Respondent told the police officers surging into the holding cell area that he was merely hugging Person A was not credible. Such a claim invites the inference that Person B is something of a fabulist, undermining his veracity.

Finally, none of the injuries Person A claims to have sustained as a result of Respondent allegedly choking him with a chokehold and his hand were observed during the medical screening at Bronx Central Booking or by the physician who examined Person A at [REDACTED]. It is noteworthy that this critical portion of Person A's hearsay statements has no credible corroboration from medical records.

The hearsay statements of the two purported eyewitnesses to the alleged choking, presumably offered in an attempt to corroborate Person A's statements, actually further undermine his credibility. In Person B's September 11, 2015, statement to CCRB (CCRB Ex. 3A), he asserts that seemed to be "looking for a way to aggravate the officer - - to make things a little better for him; aggravate the officer and have the officer somehow try to get aggressive with him" and "he was just looking for a way to make himself look a little better or save himself from trouble or make some bulls—t money from accusing the officer" (*Id.* at 6, 15). Person B also stated "I didn't see it because I was in the cell." "I think he was grabbed by the

throat,” and “I saw the officer put his hands on him . . . I think right around his chest/neck area . . . I’m assuming that he grabbed his neck,” “I think that the officer put his elbow against his neck against the wall” and “[b]ecause at the same time, I really didn’t want to, you know, be staring at some . . . I was just trying to get out of there” (*Id.* at 6-7, 8-9). In his November 11, 2015, statement (CCRB Ex. 3C), Person B appears to further qualify his earlier statement, stating “everybody knew that when the guy put his elbow across his chest, it was mostly a check, it was, it wasn’t on his neck” (*Id.* at 3).

Person B’s equivocation regarding the alleged choking leaves his statements with little probative value, save the exculpatory effect of his observation of Respondent’s arm on Person A’s chest. I note that while Respondent denied placing his arms or hands around or near Person A’s neck in a manner which could have restricted his breathing in any way, he did not affirmatively state where his right hand and arm were at all times during the struggle. Respondent’s inability to do so, however, is not unreasonable given the dynamic nature of a fight. Toward the end of the struggle, Respondent used both hands in an attempt to wrest the phone from Person A. The only other evidence on where Respondent’s right arm was during the struggle, other than Person A’s and his accounts, comes from Person B’s statement, in which he described Respondent’s arm being pressed against Person A’s chest. While Person B’s statement is hearsay, this factual assertion appears to be plausible, though uncorroborated.

Person C’s September 4, 2015, statement to CCRB (CCRB Ex. 2A) corroborates, to some extent, Person A’s factual assertions regarding Respondent choking him with his hand and then placing him in a headlock. Person C claims that Respondent placed his hands around Person A’s throat and then attempted to place him in a headlock (*Id.* at 4, 8). Person C also claims that Respondent taunted Person A as he choked him, saying, “Oh, you think you’re tough? You

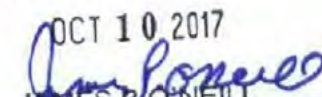
know you're going to jail because that's cocaine" (*Id.* at 8). For the reasons set forth below, I find that this hearsay statement is unreliable. First, Person C attributes provocative statements to Respondent which Person A does not include in either of his statements. This claim appears fabricated on its face. Second, Person C claims that his hand was broken during his arrest, but he was advised by police officers not to seek medical attention for the injury because it would delay his arrest processing. This claim is dubious, gratuitous and undermined his credibility. Finally, Person C admitted to "always" seeing Person A in his father's neighborhood but only knowing him by his "street name," "[REDACTED]," rather than his "government name" (*Id.* at 10). This familiarity is strongly suggestive of bias sufficient to shade his statement to Person A's benefit. Moreover, his willingness to volunteer that he had broken his hand but refrained from seeking medical attention at the suggestion of a police officer is suggestive of opportunism, rather than candor.

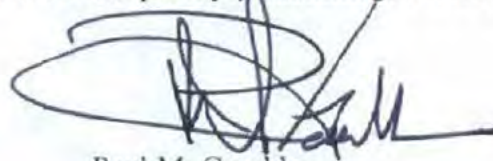
I credit Respondent's testimony as generally forthright, plausible and credible. The struggle with Person A, as he described it, comports with common sense and logic. I further find Respondent's candid admission that he was offended by Person A's conduct after he believed that he had extended him a courtesy as imbuing his testimony with the ring of truth.

Based upon the credible, relevant evidence in the record, I find that CCRB has failed to meet its burden of proof that Respondent used a prohibited chokehold or otherwise restricted Person A's breathing.

Based upon the foregoing, I find Respondent ~~Not Guilty~~ **Respectfully Submitted** Respondent's alleged misconduct.

APPROVED

OCT 10 2017

JAMES P. O'NEILL
POLICE COMMISSIONER



Paul M. Gamble
Assistant Deputy Commissioner Trials